

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

PAUL JEROME TYNER,

Plaintiff,

V.

1:04-CV-156 (WLS)

JAMES DONALD, ET. AL.,

Defendants.

ORDER

Before the Court is a Recommendation from United States Magistrate Judge Richard L. Hodge (Tab 35), filed on or about August 8, 2005, recommending the denial of Defendants' Special Report/Motion for Summary Judgement. Defendants have filed their objection to the recommendation. (Tab 36).¹

Defendants’ objection is well reasoned and argued. It is, however, a repeat of the same well made arguments that Defendants made before the Magistrate Judge. The only issue before the Magistrate Judge, and the only issue before this Court, is whether Plaintiff should be allowed to proceed *in forma pauperis* since there is no dispute that Plaintiff has accumulated “three strikes” in violation of the PLRA, 28 U.S.C. § 1915(g). The PLRA prevents a prisoner from bringing a *in forma pauperis* lawsuit in any federal court if the prisoner has filed at least three previous lawsuits that have been dismissed as frivolous, thus, the “three strikes.” An exception to this rule is where the prisoner “is under danger of physical injury.” 28 U.S.C. § 1915(g). The Magistrate Judge correctly concluded that the court reviewing this phrase should focus on the complaint at the time it was filed. Medberry v. Butler, 185 F.3d 1189 (11th Cir. 1999).

The problem in this case is that Defendants have produced substantial evidence that contradicts Plaintiff's assertion that at the time of filing the complaint he was in imminent

¹. Plaintiff filed a motion to strike Defendants' objection which was denied electronically by the Magistrate Judge. (Tab 37).

danger. The Magistrate Judge, and this Court also, acknowledges that such evidence has been produced and submitted. However, none of this information resolves the question of whether at the time of filing of the complaint, Plaintiff sufficiently pled that he faced an imminent danger. Under binding precedent, neither the Magistrate Judge nor this Court can go any further when answering this particular question. As the Magistrate Judge correctly points out, nothing in the present recommendation prevents Defendants from filing a motion for summary judgment on the merits or other defenses raised by Defendants.

Upon full review and consideration upon the record, the Court finds that said Recommendation (Tab 35) should be, and hereby is, **ACCEPTED, ADOPTED** and made the order of this Court for reason of the findings made and reasons stated therein. Accordingly, Defendants' Special Report/Motion for Summary Judgment (Tab 24) is **DENIED**.

SO ORDERED, this 20th day of September, 2005.

/s/W. Louis Sands
W. Louis Sands, Chief Judge
United States District Court